

**Staff  
Summary  
Report**



**To: Mayor & City Council**  
**Through: City Manager**

**Agenda Item Number** 40  
**Meeting Date:** 06/20/02

**SUBJECT: RESOLUTION ADOPTING THE SECTION 457 ELIGIBLE DEFERRED  
COMPENSATION PLAN**

**PREPARED BY:** Janis L. Bladine, Assistant City Attorney (350-8609)  
Julie Hietter, Employee Benefits Supervisor (350-2975)

**REVIEWED BY:** C. Brad Woodford, City Attorney (350-8229)

**BRIEF:** Resolution adopting the Section 457 Eligible Deferred Compensation Plan.

**COMMENTS: DEFERRED COMPENSATION PLAN (0303-01-01) RESOLUTION NO.  
2002.33.** A Resolution adopting the Section 457 Eligible Deferred  
Compensation Plan.

**Document Name:** (20020620cacc01) Supporting Documents: Yes

**SUMMARY:** This Resolution adopts the Section 457 Eligible Deferred Compensation Plan for the City of Tempe as amended by the Amended and Restated Section 457 Eligible Deferred Compensation Plan and approves the Adoption Agreement. The Resolution also directs the Human Resources Manager to implement the plan and educate City employees as to the new plan. The plan incorporates changes due to new federal laws.

**FISCAL NOTE:** There is no fiscal impact associated with this Resolution.

**RECOMMENDATION:** That the City Council approve Resolution No. 2002.33.

**RESOLUTION NO. 2002.33**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY  
OF TEMPE, ARIZONA, ADOPTING THE AMENDED AND  
RESTATED SECTION 457 ELIGIBLE DEFERRED  
COMPENSATION PLAN OF THE CITY OF TEMPE.**

WHEREAS, the Section 457 Eligible Deferred Compensation Plan of the City of Tempe, has been affected by new federal statutes and regulations.

WHEREAS, it is in the best interest of the employees of the City of Tempe that the Section 457 Eligible Deferred Compensation Plan of the City of Tempe be amended and restated to incorporate and comply with the new federal statutes and regulations.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, as follows:

1. That the City of Tempe Section 457 Eligible Deferred Compensation Plan as amended by the Amended and Restated Section 457 Eligible Deferred Compensation Plan of the City of Tempe and the Adoption Agreement, three copies of which are on file with the City Clerk of the City of Tempe, are hereby ratified and approved, effective July 1, 2002.

2. That the Human Resources Manager is directed to implement and take all steps necessary to inform City employees of the effects of the City of Tempe Section 457 Eligible Deferred Compensation Plan as amended by the Amended and Restated Section 457 Eligible Deferred Compensation Plan of the City of Tempe and the Adoption Agreement.

PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, THIS \_\_\_\_\_ day of \_\_\_\_\_, 2002.

\_\_\_\_\_  
MAYOR

ATTEST:

\_\_\_\_\_  
City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney

CITY OF TEMPE

SECTION 457 ELIGIBLE DEFERRED COMPENSATION PLAN

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**TABLE OF CONTENTS**  
**SECTION 457 ELIGIBLE DEFERRED COMPENSATION PLAN**

	<u>Page</u>
Introduction.....	i
 <b><u>SECTION 457 ELIGIBLE DEFERRED COMPENSATION PLAN</u></b>	
<b><u>I. INTRODUCTION</u></b> .....	1
<b><u>II. DEFINITIONS</u></b> .....	1
2.01 <u>“Administrator” or “Plan Administrator”</u> .....	1
2.02 <u>“Age 50 or Older Catch-up”</u> .....	1
2.03 <u>“Beneficiary”</u> .....	1
2.04 <u>“Code”</u> .....	1
2.05 <u>“Compensation”</u> .....	1
2.06 <u>“Custodial Account”</u> .....	1
2.07 <u>“Custodian”</u> .....	1
2.08 <u>“Deferred Compensation”</u> .....	1
2.09 <u>“Employee”</u> .....	2
2.10 <u>“Employer”</u> .....	2
2.11 <u>“Includible Compensation”</u> .....	2
2.12 <u>“Limited Catch-up”</u> .....	2
2.13 <u>“Normal Retirement Age”</u> .....	2
2.14 <u>“Participant”</u> .....	2
2.15 <u>“Participation Agreement”</u> .....	2
2.16 <u>“Plan Year”</u> .....	2
2.17 <u>“Qualified Domestic Relations Order” or “QDRO”</u> .....	2
2.18 <u>“Severance from Employment”</u> .....	2
2.19 <u>“Total Amount Deferred”</u> .....	3
2.20 <u>“Trust”</u> .....	3
2.21 <u>“Trustee”</u> .....	3
2.22 <u>“Unforeseeable Emergency”</u> .....	3
<b><u>III. ADMINISTRATION</u></b> .....	3
3.01 <u>Administrator</u> .....	3
3.02 <u>Appointment and Termination of Administrator</u> .....	3
3.03 <u>Duties of Plan Administrator</u> .....	4
3.04 <u>Administrative Fees and Expenses</u> .....	4
3.05 <u>Actions of Administrator</u> .....	5
3.06 <u>Delegation</u> .....	5
3.07 <u>Investment and Service Providers</u> .....	5
<b><u>IV. PARTICIPATION IN THE PLAN</u></b> .....	5
4.01 <u>Enrollment in the Plan</u> .....	5
4.02 <u>Deferral Limitations</u> .....	6
4.03 <u>Limited Catch-up</u> .....	6
4.04 <u>Age 50 or Older Catch-up</u> .....	7
4.05 <u>Employer Modification of Deferral</u> .....	7
4.06 <u>Participant Modification of Deferral</u> .....	8
4.07 <u>Revocation</u> .....	8
4.08 <u>Re-Enrollment</u> .....	8
4.09 <u>Transfers and Rollovers Into the Plan</u> .....	8

## TABLE OF CONTENTS (Continued)

### SECTION 457 ELIGIBLE DEFERRED COMPENSATION PLAN

	<u>Page</u>
4.10 Multiple Plans .....	9
4.11 Qualified Military Service .....	9
V. CREATION OF TRUST AND TRUST FUND .....	9
5.01 Custody of Plan Assets .....	9
5.02 Establishment of Trust .....	10
5.03 Appointment and Termination of Trustee .....	11
5.04 Acceptance .....	11
5.05 Control of Plan Assets .....	11
5.06 General Duties of the Trustee .....	11
5.07 Investment Powers of the Trustee .....	12
5.08 Trustee Fees and Expenses .....	13
5.09 Exclusive Benefit Rules .....	13
5.10 Trustee Actions .....	13
5.11 Delegation .....	14
5.12 Division of Duties and Indemnification .....	14
VI. INVESTMENTS .....	15
6.01 Investment Options .....	15
6.02 Participant Investment Direction .....	15
6.03 Employer Investment Direction .....	15
6.04 Participant Accounts .....	16
6.05 Distributions from the Trust .....	16
VII. DISTRIBUTIONS .....	16
7.01 Conditions for Distributions .....	16
7.02 Severance from Employment .....	17
7.03 In-Service Distributions and Transfers .....	17
7.04 Unforeseeable Emergencies .....	18
7.05 Death Benefits .....	19
7.06 Payment Options .....	20
7.07 Default Distribution Option .....	20
7.08 Limitations on Distribution Options .....	20
7.09 Transfers from the Plan .....	21
7.10 Taxation of Distributions .....	21
7.11 Eligible Rollover Distributions .....	21
7.12 Elections .....	22
7.13 Practices and Procedures .....	22
VIII. LEAVE OF ABSENCE .....	22
8.01 Paid Leave of Absence .....	22
8.02 Unpaid Leave of Absence .....	23
IX. PARTICIPANT LOANS .....	23
9.01 Authorization of Loans .....	23
9.02 Maximum Loan Amount .....	23
9.03 Repayment of Loan .....	23
9.04 Loan Terms and Conditions .....	23
X. AMENDMENT OR TERMINATION OF PLAN .....	25
10.01 Termination .....	25
10.02 Amendment .....	25
10.03 Copies of Amendments .....	25
XI. TAX TREATMENT OF AMOUNTS CONTRIBUTED .....	25
XII. NON-ASSIGNABILITY .....	25
12.01 Non-Assignability .....	25

## TABLE OF CONTENTS (Continued)

### SECTION 457 ELIGIBLE DEFERRED COMPENSATION PLAN

	<u>Page</u>
12.02 Qualified Domestic Relations Orders .....	26
XIII. DISCLAIMER .....	27
XIV. EMPLOYER PARTICIPATION .....	27
XV. INTERPRETATION .....	27
15.01 Governing Law .....	27
15.02 § 457 .....	27
15.03 Word Usage .....	27
15.04 Headings .....	27
15.05 Entire Agreement .....	28

## **SECTION 457 ELIGIBLE DEFERRED COMPENSATION PLAN**

### **I. INTRODUCTION**

In accordance with the provisions of § 457 of the Internal Revenue Code of 1986, as amended, the Employer named in the BenefitsCorp, Inc. Adoption Agreement for Section 457 Eligible Deferred Compensation Plan for Governmental Employers hereby establishes this Deferred Compensation Plan, hereinafter referred to as the "Plan." Nothing contained in this Plan shall be deemed to constitute an employment agreement between any Participant and Employer and nothing contained herein shall be deemed to give a Participant any right to be retained in the employ of Employer.

### **II. DEFINITIONS**

2.01 "Administrator" or "Plan Administrator" shall mean the person, persons or entity appointed by the Employer to administer the Plan pursuant to section 3.02, if any, but shall not include any company which issues policies, contracts, or investment media to the Plan in respect of a Participant.

2.02 "Age 50 or Older Catch-up" shall mean the deferred amount described in section 4.04.

2.03 "Beneficiary" shall mean the persons or entities designated by a Participant pursuant to section 4.01(c).

2.04 "Code" shall mean the Internal Revenue Code of 1986, as amended, or any future United States internal revenue law. References herein to specific section numbers of the Code shall be deemed to include Treasury regulations and Internal Revenue Service guidance thereunder and to corresponding provisions of any future United States internal revenue law.

2.05 "Compensation" shall mean all payments made to an Employee by the Employer as remuneration for services rendered, including salaries, fees and, to the extent permitted by Treasury Regulations or other similar guidance, accrued vacation and sick leave pay.

2.06 "Custodial Account" shall mean the account established with a Custodian meeting the provisions of Code § 401(f), if the Employer has elected to satisfy the trust requirement of Code § 457(g) by setting aside Plan assets in a custodial account.

2.07 "Custodian" shall mean the bank, trust company or other person authorized to hold the assets of such a custodial account in accordance with regulations issued by the Secretary of the Treasury pursuant to Code § 401(f) that is selected by the Employer to hold Plan assets if the Employer has elected to use a custodial account pursuant to Code § 457(g) and § 401(f).

2.08 "Deferred Compensation" shall mean the amount of Compensation not yet earned which the Participant and the Employer mutually agree shall be deferred.

2.09 “Employee” shall mean those individuals specified in the Adoption Agreement.

2.10 “Employer” shall mean the sponsor of the Plan as named in the Adoption Agreement.

2.11 “Includible Compensation” shall mean, for purposes of the limitation set forth in section 4.02, Compensation for services performed for the Employer as defined in Code § 457(e)(5).

2.12 “Limited Catch-up” shall mean the deferred amount described in section 4.03.

2.13 “Normal Retirement Age” shall mean age 70½, unless the Participant has elected an alternate Normal Retirement Age by written instrument delivered to the Administrator prior to Severance From Employment. A Participant’s Normal Retirement Age determines the period during which a Participant may utilize the Limited Catch-up of section 4.03 of the Plan. Once a Participant has to any extent utilized the Limited Catch-up of section 4.03 of the Plan, his Normal Retirement Age may not be changed.

A Participant’s alternate Normal Retirement Age may not be earlier than the earliest date the Participant will become eligible to retire under the Employer’s basic retirement plan without the Employer’s consent and to receive immediate retirement benefits without actuarial or similar reduction because of early retirement, and may not be later than age 70½. If the Participant will not become eligible to receive benefits under a basic retirement plan maintained by the Employer, the Participant’s alternate Normal Retirement Age may not be earlier than age 50 and may not be later than age 70½. If a Participant continues to be employed by Employer after attaining age 70½, not having previously elected an alternate Normal Retirement Age, the Participant’s alternate Normal Retirement Age shall not be later than the mandatory retirement age, if any, established by the Employer, or the age at which the Participant actually severs employment with the Employer if the Employer has no mandatory retirement age.

2.14 “Participant” shall mean any Employee who becomes a Participant pursuant to section 4.01. Except for purposes of Articles IV, VIII, and IX, “Participant” shall include former Participants. The Administrator, if he or she is otherwise eligible, may participate in the Plan.

2.15 “Participation Agreement” shall mean the agreement entered into and filed by an Employee with the Employer pursuant to section 4.01, in which the Employee elects to become a Plan Participant.

2.16 “Plan Year” shall mean the calendar year.

2.17 “Qualified Domestic Relations Order” or “QDRO” shall have the meaning specified in section 12.02.

2.18 “Severance from Employment” shall mean severance of the Participant’s employment with the Employer. A Participant shall be deemed to have severed his employment with the Employer for purposes of this Plan when both parties consider the employment relationship to have terminated and neither party anticipates any future employment of the Participant by the Employer.



In the case of a Participant who is an independent contractor, Severance from Employment shall be deemed to have occurred when the Participant's contract for services has completely expired and terminated, there is no foreseeable possibility that the Employer shall renew the contract or enter into a new contract for services to be performed by the Participant, and it is not anticipated that the Participant shall become an Employee of the Employer.

2.19 "Total Amount Deferred" shall mean, with respect to each Participant, the sum of all Compensation deferred under the Plan, plus income and minus loss thereon (including amounts determined with reference to life insurance policies) and less the amount of any expenses or distributions authorized by this Plan, calculated in accordance with section 6.04.

2.20 "Trust" shall mean the trust created under Article V of the Plan if the Employer or certain employees are named as Trustee(s) in the Adoption Agreement. "Trust" shall mean a trust created by a separate written agreement between the Employer and the Trustee if a bank or trust company is named as Trustee in the Adoption Agreement. The Trust shall consist of all Plan assets held by the Trustee named in the Adoption Agreement.

2.21 "Trustee" shall mean the Employer or such other person, persons or entity selected by the Employer who agrees to act as Trustee hereunder if elected in the Adoption Agreement. This term (except as used in Article V) also refers to the person holding the assets of any custodial account or holding any annuity contract described in section 5.01.

2.22 "Unforeseeable Emergency" shall mean severe financial hardship to a Participant resulting from a sudden and unexpected illness or accident of the Participant or of a dependent (as defined in Code § 152(a)) of the Participant, loss of the Participant's property due to casualty, or other similar extraordinary and unforeseeable circumstances arising as a result of events beyond the control of the Participant as defined in Code § 457. Whether a hardship constitutes an Unforeseeable Emergency under section 7.04 shall be determined in the sole discretion of the Administrator.

### **III. ADMINISTRATION**

3.01 Administrator. The Employer shall be the Administrator unless another person or persons is appointed by the Employer in the Adoption Agreement as set forth in section 3.02.

3.02 Appointment and Termination of Administrator. An Administrator may be named in the Adoption Agreement by the Employer and may be a Participant. The Administrator shall remain in office at the will of the Employer and may be removed from office at any time by the Employer, with or without cause. Such removal shall be effective upon delivery of written notice to the Administrator or at such later time as may be designated in such notice; provided that any such notice of removal shall take effect no later than 60 days after the delivery thereof, unless such 60 day period shall be waived. The Administrator may resign at any time upon giving written notice to the Employer or at such later time as may be designated in the notice of resignation; provided that (a) any such notice of resignation shall take effect no later than 60 days after the delivery thereof, unless such 60 day period shall be waived and (b) upon such resignation or removal the Employer shall have the

power and the duty to designate and appoint a successor Administrator, and the actual appointment of a successor Administrator is a condition that must be fulfilled before the resignation or removal of the Administrator shall become effective. Upon appointment, the successor Administrator shall have all the rights, powers, privileges, liabilities and duties of the predecessor Administrator. The Administrator so resigned or removed shall take any and all action necessary to vest the rights, powers, privileges, liabilities and duties of the Administrator in the successor.

3.03 Duties of Plan Administrator. Subject to any applicable laws and any approvals required by the Employer, the Plan Administrator shall have full power and authority to adopt rules, regulations and procedures for the administration of the Plan, and to interpret, alter, amend, or revoke any rules, regulations or procedures so adopted. The Plan Administrator's duties shall include:

- (a) appointing the Plan's attorney, accountant, actuary, custodian or any other party needed to administer the Plan or the Plan assets;
- (b) directing the Trustee with respect to payments from the Plan assets held in Trust;
- (c) communicating with Employees regarding their participation and benefits under the Plan, including the administration of all claims procedures;
- (d) filing any returns and reports with the Internal Revenue Service or any other governmental agency;
- (e) reviewing and approving any financial reports, investment reviews, or other reports prepared by any party appointed under paragraph (a);
- (f) establishing a funding policy and investment objectives consistent with the purposes of the Plan; and
- (g) construing and resolving any question of Plan interpretation. The Plan Administrator's interpretation of Plan provisions including eligibility and benefits under the Plan is final.

3.04 Administrative Fees and Expenses. All reasonable costs, charges and expenses incurred by the Plan Administrator in connection with the administration of the Plan (including fees for legal services rendered to the Plan Administrator) may be paid by the Employer, but if not paid by the Employer when due, shall be paid from Plan assets. Such reasonable compensation to the Administrator as may be agreed upon from time to time between the Employer and Plan Administrator may be paid by the Employer, but if not paid by the Employer when due shall be paid from Plan assets. Notwithstanding the foregoing, no compensation other than reimbursement for expenses shall be paid to a Plan Administrator who is the Employer or a full-time Employee of the Employer. In the event any part of the assets in the Plan become subject to tax, all taxes incurred shall be paid from the Plan assets unless the Plan Administrator advises the Trustee not to pay such tax.

3.05 Actions of Administrator. Every action taken by the Plan Administrator shall be presumed to be a fair and reasonable exercise of the authority vested in or the duties imposed upon him, her, or it. The Plan Administrator shall be deemed to have exercised reasonable care, diligence and prudence and to have acted impartially as to all persons interested, unless the contrary be proven by affirmative evidence. The Plan Administrator shall not be liable for amounts of Compensation deferred by Participants or for other amounts payable under the Plan.

3.06 Delegation. Subject to any applicable laws and any approvals required by the Employer, the Plan Administrator may delegate any or all of his, her or its powers and duties hereunder to another person, persons, or entity, and may pay reasonable compensation for such services as an administrative expense of the Plan, to the extent such compensation is not otherwise paid.

3.07 Investment and Service Providers. Any company which issues policies, contracts, or investment media to the Employer or in respect of a Participant is not a party to this Plan and such company shall have no responsibility, accountability, or liability to the Employer, the Administrator, any Participant, or any Beneficiary with regard to the operation or adequacy of this Plan, including any future amendments made thereto.

#### **IV. PARTICIPATION IN THE PLAN**

##### **4.01 Enrollment in the Plan.**

- (a) An Employee may become a Participant by entering into a Participation Agreement. Compensation will be deferred for any payroll period if a Participation Agreement providing for such deferral is entered into by the Participant and approved by the Administrator before the beginning of such payroll period. With respect to a new Employee, Compensation shall be deferred for the payroll period during which a Participant first becomes an Employee if a Participation Agreement providing for such deferral is entered into by the Participant and approved by the Administrator before the first day on which the Participant becomes an Employee. Any prior employee who was a Participant in the Plan and is rehired by Employer may resume participation in the Plan by entering into a Participation Agreement. Unless distributions from the Plan have begun due to that prior Severance from Employment, however, any deferred commencement date elected by such employee with respect to those prior Plan assets shall be null and void.

In entering into the Participation Agreement, the Participant elects to participate in this Plan and consents to the deferral by the Employer of the amount specified in the Participation Agreement from the Participant's gross compensation for each payroll period. Such deferral shall continue in effect until modified, disallowed or revoked in accordance with the terms of this Plan, or until the Participant ceases employment with the Employer. The Employer retains the right to establish minimum deferral amounts

per payroll period and to limit the number and/or timing of enrollments into the Plan in the Participation Agreement.

- (b) Notwithstanding section 4.01(a), to the extent permitted by applicable law, the Administrator may establish procedures whereby each Employee becomes a Participant in the Plan and, as a term or condition of employment, elects to participate in the Plan and consents to the deferral by the Employer of a specified amount for any payroll period for which a Participation Agreement is not in effect. In the event such procedures are in place, a Participant may elect to defer a different amount of compensation per payroll period, including zero, by entering into a Participation Agreement.
- (c) Beneficiary. Each Participant may designate in the Participation Agreement or in any other manner authorized by the Administrator a Beneficiary or Beneficiaries to receive any amounts which may be distributed in the event of the death of the Participant prior to the complete distribution of benefits. A Participant may change the designation of Beneficiaries at any time by filing with the Administrator a written notice on a form approved by the Administrator. If no such designation is in effect on the Participant's death, or if the designated Beneficiary does not survive the Participant by 30 days, his Beneficiary shall be his surviving spouse, if any, and then his estate.

#### 4.02 Deferral Limitations.

- (a) Except as provided in sections 4.03 and 4.04, the maximum that may be deferred under the Plan for any taxable year of a Participant shall not exceed the lesser of (1) the applicable dollar amount in effect for the year, as adjusted for the calendar year in accordance with Code § 457(e)(15), or (2) 100% of the Participant's Includible Compensation, each reduced by any amount specified in section 4.02(b) for that taxable year.
- (b) The deferral limitation shall be reduced by any amount excludable from the Participant's gross income attributable to elective deferrals to another eligible deferred compensation plan described in Code § 457(b).

4.03 Limited Catch-up. For one or more of the Participant's last three taxable years ending before the taxable year in which Normal Retirement Age under the Plan is attained, the maximum deferral shall be the lesser of:

- (a) twice the applicable dollar limit in effect under Code § 457(e)(15), reduced by any applicable amount specified in section 4.02(b) for that taxable year; or
- (b) the sum of:
  - (1) the limitations established for purposes of section 4.02 of the Plan, for such taxable year (determined without regard to this section 4.03), plus
  - (2) so much of the limitation established under section 4.02 of the Plan or established in accordance with Code § 457(b)(2) and the regulations thereunder

under an eligible deferred compensation plan sponsored by an entity other than the Employer and located in the same state for prior taxable years (beginning after December 31, 1978 and during all or any portion of which the Participant was eligible to participate in this Plan) as has not theretofore been used under sections 4.02 or 4.03 hereof or under such other plan (taking into account the limitations under and participation in other eligible deferred compensation plans in accordance with the Code); provided, however, that this section 4.03 shall not apply with respect to any Participant who has previously utilized in whole or in part the limited catch-up under this Plan or under any other eligible deferred compensation plan (within the meaning of Code § 457).

4.04 Age 50 or Older Catch-up. A Participant who attains age 50 or older by the end of a Plan Year and who does not utilize the Limited Catch-up for such Plan Year may make a deferral in excess of the limitation specified in section 4.02, up to the amount specified in and subject to any other requirements under Code § 414(v).

4.05 Employer Modification of Deferral. The Employer or Administrator shall have the right to modify or disallow the periodic deferral of Compensation elected by the Participant:

- (a) in excess of the limitations stated in sections 4.02, 4.03 and 4.04;
- (b) in excess of the Participant's net Compensation for any payroll period;
- (c) upon any change in the length of payroll period utilized by Employer. In such case the periodic deferral shall be adjusted so that approximately the same percentage of pay shall be deferred on an annual basis;
- (d) in order to round periodic deferrals to the nearest whole dollar amount;
- (e) to reduce the future deferrals in the event that the amount actually deferred for any payroll period exceeds, for any reason whatsoever, the amount elected by the Participant. In the alternative, such amount of excess deferral may be refunded to the Participant. No adjustment in future deferrals shall be made if a periodic deferral is missed or is less than the amount elected, for any reason whatsoever; or
- (f) if the deferral elected for any payroll period is less than the minimum amount specified in section 4.01(a);

And to the extent permitted by and in accordance with the Code, the Employer or Administrator may distribute the amount of a Participant's deferral in excess of the distribution limitations stated in sections 4.02, 4.03 and 4.04 notwithstanding the limitations of Article VII; provided, however, that the Employer and the Administrator shall have no liability to any Participant or Beneficiary with respect to the exercise of, or the failure to exercise, the authority provided in this section 4.05.

4.06 Participant Modification of Deferral. A Participant may modify the Participation Agreement at the times and in the manner authorized by the Administrator with respect to Compensation payable no earlier than the payroll period after such modification is entered into by the Participant and accepted by the Administrator. Notwithstanding the above, if a negative election procedure has been implemented pursuant to section 4.01(b), a Participant may enter into or modify a Participation Agreement at any time to provide for no deferral.

4.07 Revocation. A Participant may at any time revoke the agreement to defer Compensation by filing a request for revocation to the Administrator in a manner approved by the Administrator. Such revocation will be effective for the payroll period following the Administrator's receipt of the revocation or as soon as administratively feasible thereafter. However, the Total Amount Deferred shall be distributed only as provided in Articles VI and VII and shall be subject to the terms and provisions of the affected investment option. A Participant's request for a distribution in the event of an Unforeseeable Emergency shall in addition be treated as a request for revocation of deferrals as of a date determined by the Administrator for the period of time determined under section 7.04.

4.08 Re-Enrollment. A Participant who revokes the Participation Agreement as set forth in section 4.07 above may again become a Participant at the times and in the manner authorized by the Administrator, by entering into a new Participation Agreement to defer Compensation payable no earlier than the payroll period after such new Participation Agreement is entered into entered into by the Participant and accepted by the Administrator.

4.09 Transfers and Rollovers Into the Plan.

- (a) Transfers to the Plan. If the Participant was formerly a Participant in an eligible deferred compensation plan maintained by another employer, and if such plan permits the direct transfer of the Participant's interest therein to the Plan, then the Plan shall accept assets representing the value of such interest; provided, however, that the Participant has separated from service with that prior employer and become an Employee of Employer. Such amounts shall be held, accounted for, administered and otherwise treated in the same manner as Compensation deferred by the Participant under this Plan except that such amounts shall not be considered Compensation deferred under the Plan in the taxable year of such transfer in determining the maximum deferral under section 4.02. The Employer may require such documentation from the predecessor plan as it deems necessary to confirm that such plan is an eligible deferred compensation plan within the meaning of Code § 457, and to assure that transfers are provided under such plan. The Employer may refuse to accept a transfer in the form of assets other than cash, unless Employer and the plan administrator agree to hold such other assets under the Plan.
- (b) Rollovers to Plan. If so specified in the Adoption Agreement, the Plan shall accept a rollover contribution on behalf of a Participant or Employee who may become a Participant. A rollover contribution for purposes of this subsection is an eligible rollover contribution (as defined in Code § 402(f)(2)) from any (i) plan qualified under Code §§ 401(a) or 403(a); (ii) tax-sheltered annuity or custodial account described in

Code § 403(b); (iii) individual retirement account or annuity described in Code § 408; or (iv) eligible deferred compensation plan described in Code § 457(b) maintained by an eligible employer described in Code § 457(e)(1)(A). Prior to accepting any rollover contribution, the Administrator may require that the Participant or Employee establish that the amount to be rolled over to the Plan is a valid rollover within the meaning of the Code. A Participant's rollover contribution shall be held in a separate rollover account or accounts, as the Administrator shall determine from time to time.

**4.10 Multiple Plans.** In the case of a Participant who participates in more than one deferred compensation plan governed by Code § 457, the limitations set forth in sections 4.02, 4.03 and 4.04 shall, to the extent required under the Code, apply to all such plans considered together. For purposes of sections 4.02, 4.03 and 4.04, Compensation deferred shall be taken into account at its value in the Plan Year in which deferred.

**4.11 Qualified Military Service.** Notwithstanding any provision of this Plan to the contrary, contributions and benefits with respect to qualified military service shall be provided in accordance with Code § 414(u).

## **V. CREATION OF TRUST AND TRUST FUND**

**5.01 Custody of Plan Assets.** All contributions under the Plan, all property and rights purchased with such amounts, and all income attributable to such amounts, property or rights shall be held for the exclusive benefit of Participants and their Beneficiaries. The trust requirement of Code § 457(g) shall be satisfied in the manner specified in the Adoption Agreement. Depending upon the choices made in the Adoption Agreement, Plan assets shall be set aside as follows:

- (a) If elected in Box C. 1 of the Adoption Agreement, Plan assets shall be set aside in trust pursuant to this Article V with the Employer or certain employees of (or holders of certain positions with) the Employer named as Trustee. The Trustee shall be named in the Adoption Agreement and shall accept such appointment by executing same. All contributions to the Plan shall be transferred to the Trust established under the Plan within a period that is not longer than is reasonable for the proper administration of the Accounts of Participants.
- (b) If elected in Box C. 2 of the Adoption Agreement, Plan assets will be set aside in trust pursuant to a separate written trust agreement entered into between the Employer and the bank or trust company named as Trustee. The bank or trust company named in the Adoption Agreement shall be the Trustee and shall accept such appointment by executing the same. Any Trust under the Plan shall be established pursuant to a written agreement that constitutes a valid trust under the law of the state where the Employer is located. All contributions to the Plan shall be transferred to a Trust established under

the Plan within a period that is not longer than is reasonable for the proper administration of the Accounts of Participants.

- (c) If elected in Box C. 3 of the Adoption Agreement, Plan assets shall be set aside in one or more annuity contracts described in Code § 401(f). Notwithstanding any contrary provision of the Plan, including any annuity contract issued under the Plan, in accordance with Code § 457(g), all contributions to the Plan, all property and rights purchased with such amounts, and all income attributable to such amounts, property, or rights shall be held under one or more annuity contracts, as defined in Code § 401(g), issued by an insurance company qualified to do business in the state where the contract was issued, for the exclusive benefit of Participants and Beneficiaries under the Plan. For this purpose, the term “annuity contract” does not include a life, health or accident, property, casualty, or liability insurance contract. The owner of the annuity contract is the “deemed trustee” of the assets invested under the contract for purposes of Code § 401(a). All contributions to the Plan shall be transferred to such annuity contract within a period that is not longer than is reasonable for the proper administration of the Accounts of Participants.
- (d) If elected in Box C. 4 of the Adoption Agreement, Plan assets shall be set aside in one or more custodial accounts described in Code § 401(f). The bank, trust company or other person named in the Adoption Agreement shall be the Custodian and “deemed trustee” for purposes of Code § 457(g) and shall accept such appointment by executing the same. The Employer and Custodian shall enter into a separate written custody agreement. For purposes of this paragraph, the Custodian of any custodial account created pursuant to the Plan must be a bank, as described in Code § 408(n), or a person who meets the non-bank Trustee requirements of paragraphs (2)-(6) of section 1.408-2(e) of the Income Tax Regulations relating to the use of non-bank Trustees. All contributions to the Plan shall be transferred to a custodial account described in Code § 401(f) within a period that is not longer than is reasonable for the proper administration of the Accounts of Participants.

5.02 Establishment of Trust. If elected in Box C. 1 of the Adoption Agreement, the Employer or named Employees of Employer (or certain holders of positions with the Employer) shall serve as Trustee as evidenced by the Trustee’s execution of the applicable page of the Adoption Agreement. In that event, a Trust is hereby created to hold all of the assets of the Plan for the exclusive benefit of Participants and Beneficiaries. The Trust shall consist of all contributions made under the Plan and the investment earnings thereon. All contributions and the earnings thereon less payments made under the terms of the Plan, including fees and expenses, shall constitute the Trust. Except to the extent that the Employer enters into a separate written trust agreement with a bank or trust company Trustee, the assets in Trust shall be administered as provided in this document.

If elected in Box C. 2 of the Adoption Agreement, the bank or trust company named in the Adoption Agreement shall serve as Trustee as evidenced by the Trustee’s execution of the applicable page of the Adoption Agreement. In that event, a Trust shall be created to hold all of the assets of the Plan for the exclusive benefit of Participants and Beneficiaries pursuant to a separate written trust



instrument between the Employer and the Trustee setting out the Trustee's duties, rights, responsibilities, fees and expenses, the division of duties and indemnification; the provisions of this Article V shall not apply. The Trust shall consist of all contributions made under the Plan which are held by the Trustee.

5.03 Appointment and Termination of Trustee. A Trustee may be named by the Employer and may be a Participant. The Trustee shall remain in office at the will of the Employer and may be removed from office at any time by the Employer, with or without cause. Such removal shall be effective upon delivery of written notice to the Trustee or at such later time as may be designated in such notice; provided that any such notice of removal shall take effect no sooner than 30 days and no later than 60 days after the delivery thereof, unless such 30 or 60 day period shall be waived. The Trustee may resign at any time upon giving written notice to the Employer or at such later time as may be designated in the notice of resignation; provided that (a) any such notice of resignation shall take effect no sooner than 30 days and no later than 60 days after the delivery thereof, unless such 30 day or 60 day period shall be waived and (b) upon such resignation or removal the Employer shall have the power and the duty to designate and appoint a successor Trustee, and the actual appointment of a successor Trustee is a condition that must be fulfilled before the resignation or removal of the Trustee shall become effective.

Upon appointment, the successor Trustee shall have all the rights, powers, privileges, liabilities and duties of the predecessor Trustee. The Trustee so resigned or removed shall take any and all action necessary to vest the rights, powers, privileges, liabilities and duties of the Administrator in his, her or its successor.

5.04 Acceptance. By signing the Adoption Agreement the Trustee accepts the Trust created under the Plan and agrees to perform the obligations imposed.

5.05 Control of Plan Assets. The assets of the Trust or evidence of ownership shall be held by the Trustee, under the terms of the Plan and under either this Article V or under the separate written trust agreement with a bank or trust company. If the assets represent amounts transferred from a former plan, the Trustee shall not be responsible for the propriety of any investment under the former plan.

5.06 General Duties of the Trustee. The Employer or named individuals in the employ of the Employer named as Trustee(s) in the Adoption Agreement shall be responsible for the administration of investments held in the Plan. The Trustee's duties shall include:

- (a) receiving contributions under the terms of the Plan;
- (b) making distributions from Plan assets held in Trust in accordance with written instructions received from an authorized representative of the Employer;
- (c) keeping accurate records reflecting its administration of the Trust assets and making such records available to the Employer for review and audit. Within 90 days after each Plan Year, and within 90 days after its removal or resignation, the Trustee shall file with the Employer an accounting of its administration of the Trust assets during

such year or from the end of the preceding Plan Year to the date of removal or resignation. Such accounting shall include a statement of cash receipts and disbursements since the date of its last accounting and shall contain an asset list showing the fair market value of investments held in the Trust as of the end of the Plan Year;

The value of marketable investments shall be determined using the most recent price quoted on a national securities exchange or over the counter market. The value of non-marketable investments shall be determined in the sole judgment of the Trustee which determination shall be binding and conclusive. The value of investments in securities or obligations of the Employer in which there is no market shall be determined in the sole judgment of the Employer and the Trustee shall have no responsibility with respect to the valuation of such assets. The Employer shall review the Trustee's accounting and notify the Trustee in the event of its disapproval of the report within 90 days, providing the Trustee with a written description of the items in question. The Trustee shall have 60 days to provide the Employer with a written explanation of the items in question; and

- (d) employing such agents, attorneys or other professionals as the Trustee may deem necessary or advisable in the performance of its duties.

The Trustee's duties shall be limited to those described above. The Employer shall be responsible for any other administrative duties required under the Plan or by applicable law.

5.07 Investment Powers of the Trustee. The Trustee shall implement an investment program based on the Employer's investment objectives. If either the Employer or the Employee fails to issue investment directions as provided in sections 6.01 and 6.02, the Trustee shall have authority to invest the Trust assets in its sole discretion. In addition to powers given by law, the Trustee may:

- (a) invest the Trust assets in any form of property, including common and preferred stocks, exchange and trade put and call options, bonds, money market instruments, mutual funds (including Trust assets for which the Trustee or its affiliates serve as investment advisor), Treasury bills, deposits at reasonable rates of interest at banking institutions including but not limited to savings accounts and certificates of deposit, and other forms of securities or investment of any kind, class, or character whatsoever, or in any other property, real or personal, having a ready market;
- (b) invest and reinvest all or any part of the Trust assets in any insurance policies or other contracts with insurance companies including but not limited to individual or group annuity, deposit administration, and guaranteed interest contracts. Such contracts shall be held in the name of the Trustee;
- (c) transfer any assets of the Trust to any group or common, collective or commingled fund that is maintained by a bank or other institution that is established to permit the

pooling of Trust assets of separate Trusts so long as such Trust assets are available to § 457 plans;

- (d) hold cash uninvested and deposit same with any banking or savings institution at reasonable interest;
- (e) join in or oppose the reorganization, recapitalization, consolidation, sale or merger of corporations or properties, including those in which it is interested as a Trustee, upon such terms as it deems wise;
- (f) hold investments in nominee or bearer form;
- (g) to vote or refrain from voting any stocks, bonds, or other securities held in the Trust, to exercise any other right appurtenant to any securities or other property held in the Trust, to vote or refrain from voting proxies;
- (h) exercise all ownership rights with respect to assets held in the Trust; and
- (i) do any and all other acts that may be deemed necessary in the performance of the Trustee's duties hereunder.

5.08 Trustee Fees and Expenses. All reasonable costs, charges and expenses incurred by the Trustee in connection with the administration of the Trust assets (including fees for legal services rendered to the Trustee) may be paid by the Employer, but if not paid by the Employer when due, shall be paid from the Trust. Such reasonable compensation to a bank or trust company Trustee as may be agreed upon from time to time between the Employer and the Trustee may be paid by the Employer, but if not paid by the Employer when due shall be paid by the Trust. The Trustee shall have the right to liquidate Trust assets to cover its fees. Notwithstanding the foregoing, no compensation other than reimbursement for expenses shall be paid to a Trustee who is the Employer or a full-time Employee of the Employer. In the event any part of the Trust assets become subject to tax, all taxes incurred shall be paid from the Trust unless the Plan Administrator advises the Trustee not to pay such tax.

5.09 Exclusive Benefit Rules. No part of the Trust assets shall be used for, or diverted to, purposes other than for the exclusive benefit of Participants, former Participants with a interest in the Plan, and the Beneficiary or Beneficiaries of a deceased Participant having an interest in the Trust assets at the death of the Participant.

5.10 Trustee Actions. Every action taken by the Trustee shall be presumed to be a fair and reasonable exercise of the authority vested in or the duties imposed upon him, her, or it. The Trustee shall be deemed to have exercised reasonable care, diligence and prudence and to have acted impartially as to all persons interested, unless the contrary be proven by affirmative evidence. The Trustee shall not be liable for amounts of Compensation deferred by Participants or for other amounts payable under the Plan.

5.11 Delegation. Subject to any applicable laws and any approvals required by the Employer, the Trustee may delegate any or all powers and duties hereunder to another person, persons, or entity, and may pay reasonable compensation for such services as an administrative expense of the Plan, to the extent such compensation is not otherwise paid.

5.12 Division of Duties and Indemnification.

- (a) The Trustee shall have the authority and discretion to manage and govern the Trust assets to the extent provided in this instrument, but does not guarantee the Trust in any manner against investment loss or depreciation in asset value, or guarantee the adequacy of the Trust assets to meet and discharge all or any liabilities of the Plan.
- (b) The Trustee shall not be liable for the making, retention or sale of any investment or reinvestment made by it, as herein provided, or for any loss to, or diminution of the Trust assets or for any other loss or damage which may result from the discharge of its duties hereunder except to the extent it is judicially determined that the Trustee has failed to exercise the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character with like aims.
- (c) The Employer warrants that all directions issued to the Trustee by it or the Plan Administrator shall be in accordance with the terms of the Plan and not contrary to the provisions of the Code.
- (d) The Trustee shall not be answerable for any action taken pursuant to any direction, consent, certificate, or other paper or document on the belief that the same is genuine and signed by the proper person. All directions by the Employer or the Plan Administrator shall be in writing from the authorized individual or individuals named in the Adoption Agreement.
- (e) The duties and obligations of the Trustee shall be limited to those expressly imposed upon it by this instrument or subsequently agreed upon by the parties. Responsibility for administrative duties required under the Plan or applicable law not expressly imposed upon or agreed to by the Trustee shall rest solely with the Employer.
- (f) The Trustee shall be indemnified and held harmless by the Employer from and against any and all liability to which the Trustee may be subjected, including all expenses reasonably incurred in its defense, for any action or failure to act resulting from compliance with the instructions of the Employer, the employees or agents of the Employer, the Plan Administrator, or any other fiduciary to the Plan, and for any liability arising from the actions or inactions of any predecessor Trustee, custodian or other fiduciaries of the Plan.
- (g) The Trustee shall not be responsible in any way for the application of any payments it is directed to make or for the adequacy of the Trust assets to meet and discharge any and all liabilities under the Plan.

## **VI. INVESTMENTS**

**6.01 Investment Options.** The Employer have the sole discretion to select one or more investment options from which Participants may instruct the Trustee as to the investment of their Account balances. These investment options may include specified life insurance policies, annuity contracts, or investment media issued by an insurance company. It shall be the sole responsibility of the Employer to ensure that all investment options offered under the Plan are appropriate and in compliance with any and all state laws pertaining to such investments.

**6.02 Participant Investment Direction.** If the Employer chooses to designate one or more investment options in which Participants may direct investment of their Account, Participants shall have the option to direct the investment of their Account from among the investment options designated by the Employer. Such investment options shall be under the full control of the Trustee. A Participant's right to direct the investment of Account balances shall apply only to making selections among the options made available under the Plan and only to the extent specified by the Employer pursuant to uniform rules.

- (a) Each Participant shall designate on the form prescribed by the Administrator the one or more investment options in which he or she wishes to have his Account invested and may change such investment directions in accordance with and at the time or times specified under uniform rules established by the Administrator. The Participant's Account shall be debited or credited as appropriate to reflect all gains or losses on such investments.
- (b) Neither the Employer, the Administrator, the Trustee nor any other person shall be liable for any loss incurred by virtue of following the Participant's directions or by reason of any reasonable administrative delay in implementing such directions.
- (c) The Employer may from time to time change the investment options made available under the Plan pursuant to uniform rules established by the Administrator. If the Employer eliminates an investment option, all Participants who had chosen that investment option shall select another option. If no new option is selected by the Participant, money remaining in the eliminated investment option shall be reinvested at the direction of the Employer. The Participants shall have no right to require the Employer to select or retain any investment option. Any change with respect to investment options made by the Employer or a Participant, however, shall be subject to the terms and conditions (including any rules or procedural requirements) of the affected investment options.

### **6.03 Employer Investment Direction.**

- (a) To the extent the Employer chooses not to allow Participant direction of the investment of his or her Account, the Employer shall have the right to direct the Trustee with respect to investments of the Trust assets, may appoint an investment manager to direct investments or may give the Trustee sole investment management

responsibility. Any investment directive shall be made in writing by the Employer or investment manager. Such instructions regarding the delegation of investment responsibility shall remain in force until revoked or amended in writing. The Trustee shall not be responsible for the propriety of any investment made at the direction of the Employer or an investment manager and shall not be required to consult with or advise the Employer regarding the investment quality of any directed investment held hereunder. In the absence of such written directive, the Trustee shall automatically invest the available cash in its discretion in an appropriate interim investment until specific investment directions are received.

- (b) If the Employer fails to direct the investment of Trust assets or name an investment manager, the Trustee shall have full investment authority.

6.04 Participant Accounts. The Administrator shall maintain or cause to be maintained one or more individual accounts for each Participant. Such accounts shall include separate accounts, as necessary, for Code § 457 Deferred Compensation, Code § 457 rollovers, IRA rollovers, other qualified plan and Code § 403(b) plan rollovers, and such other accounts as may be appropriate from time-to-time for plan administration. At regular intervals established by the Administrator, each Participant's account(s) shall be credited with the amount of any Deferred Compensation paid into the Trust; debited with any applicable administrative or investment expense, including, but not limited to, fees charged to Participants, allocated on a reasonable and consistent basis; credited or debited with investment gain or loss, as appropriate; and debited with the amount of any distribution. At least once a year each Participant shall be notified in writing of his Total Amount Deferred.

6.05 Distributions from the Trust. The payment of benefits from the Trust in accordance with the terms of the Plan may be made by the Trustee, or by any custodian or other person so authorized by the Employer to make such distribution. Neither the Plan Administrator, the Trustee nor any other person shall be liable with respect to any distribution from the Trust made at the direction of the Employer or a person authorized by the Employer to give disbursement direction.

## **VII. DISTRIBUTIONS**

7.01 Conditions for Distributions.(a) § 457 Deferred Compensation. Payments from a Participant's § 457 Deferred Compensation account to the Participant or Beneficiary shall not be made earlier than:

- (1) the Participant's Severance from Employment or death;
- (2) the Participant's account meets all of the requirements for an in-service *de minimis* distribution pursuant to section 7.03;

- (3) the Participant incurs an approved Unforeseeable Emergency pursuant to section 7.04;
  - (4) the Participant transfers an amount to a defined benefit governmental plan pursuant to section 7.03(c); or
  - (5) The calendar year in which the Participant attains age 70 1/2.
- (b) Rollovers. Payments from a Participant's rollover account(s) may be made at any time.
- 7.02 Severance from Employment. (a) Subject to section 7.02(b), distributions to a Participant shall commence following his or her Severance from Employment, on the regular distribution commencement date (as the Employer or Administrator may establish from time-to-time) elected by the Participant, in a form and manner determined pursuant to sections 7.06, 7.07 and 7.08.
- (b) Upon notice to Participants, and subject to sections 7.08(b), 7.10(b) and 7.11, the Administrator may establish procedures under which a Participant whose total § 457 Deferred Compensation account balance is less than an amount specified by the Administrator (not in excess of \$5,000 or other applicable limit under the Code) will receive a lump sum distribution on the first regular distribution commencement date (as the Employer or Administrator may establish from time-to-time) following the Participant's Severance from Employment, notwithstanding any election made by the Participant pursuant to section 7.02(a).

7.03 In-Service Distributions and Transfers.

- (a) Voluntary In-Service Distribution of *De Minimis* Accounts. A Participant who is an active Employee shall receive a distribution of the total amount payable to the Participant under the Plan if the following requirements are met:
- (1) the portion of the total amount payable to the Participant under the Plan does not exceed an amount specified from time to time by the Administrator (not in excess of \$5,000 or other applicable limit under the Code);
  - (2) the Participant has not previously received an in-service distribution of the total amount payable to the Participant under the Plan;
  - (3) no amount has been deferred under the Plan with respect to the Participant during the two-year period ending on the date of the in-service distribution; and
  - (4) the Participant elects to receive the distribution.
- (b) Involuntary In-Service Distribution of *De Minimis* Accounts.

Upon notice to Participants, and subject to section 7.11, the Administrator may establish procedures under which the Plan shall distribute the total amount payable under the Plan to a Participant who is an active Employee if the following requirements are met:

- (1) the portion of the total amount payable to the Participant under the Plan does not exceed an amount specified from time to time by the Administrator (not in excess of \$5,000 or other applicable limit under the Code);
- (2) the Participant has not previously received an in-service distribution of the total amount payable to the Participant under the Plan; and
- (3) no amount has been deferred under the Plan with respect to the Participant during the two-year period ending on the date of the in-service distribution.

(c) Transfer for Purchase of Defined Benefit Plan Service Credit.

If a Participant is also a Participant in a defined benefit governmental plan (as defined in Code § 414(d)), such Participant may request the Plan Administrator to transfer amounts from his or her account for (i) the purchase of permissive service credit (as defined in Code § 415(n)(3)(A)) under such plan, or (ii) a repayment to which Code § 415 does not apply by reason of Code § 415(k)(3). Such transfer requests shall be granted in the sole discretion of the Plan Administrator, and if granted, shall be made directly to the defined benefit governmental plan.

7.04 Unforeseeable Emergencies. If the Plan Administrator has determined that a Participant has incurred a genuine Unforeseeable Emergency and that no other resources of financial relief are available, the Plan Administrator may grant, in its sole discretion, a Participant's request for a payment from the Participant's § 457 Deferred Compensation account. Any payment made under this provision shall be in a lump sum.

- (a) The Plan Administrator shall have the right to request and review all pertinent information necessary to assure that hardship withdrawal requests are consistent with the provisions of Code § 457.
- (b) In no event, however, shall an Unforeseeable Emergency distribution be made if such hardship may be relieved:
  - (1) through reimbursement or compensation by insurance or otherwise;
  - (2) by liquidation of the Participant's assets, to the extent the liquidation of the Participant's assets would not itself cause a severe financial hardship; or
  - (3) by cessation of deferrals under this Plan; or



- (4) if allowed, by taking out a loan under this Plan, provided that the repayment of such loan does not itself cause financial hardship
- (c) The amount of any financial hardship benefit shall not exceed the lesser of:
  - (1) the amount reasonably necessary, as determined by the Plan Administrator, to satisfy the hardship; or
  - (2) the amount of the Participant's account.
- (d) The Employer or Administrator may suspend the Participant's salary deferral election during the pendency of the Participant's request for a financial hardship distribution. Payment of a financial hardship distribution shall result in mandatory suspension of deferrals for a minimum of six (6) months from the date of payment (or such other period as mandated in Treasury Regulations).
- (e) Except to the extent authorized in Treasury Regulations the following events are not considered unforeseeable emergencies under the Plan:
  - (1) enrollment of a child in college;
  - (2) purchase of a house;
  - (3) purchase or repair of an automobile;
  - (4) repayment of loans;
  - (5) payment of income taxes, back taxes, or fines associated with back taxes;
  - (6) unpaid expenses including rent, utility bills, mortgage payments, or medical bills;
  - (7) marital separation or divorce; or
  - (8) bankruptcy except when resulting directly and solely from illness or casualty loss.

#### 7.05 Death Benefits.

- (a) Upon the Participant's death, the Participant's remaining account balance(s) will be distributed to the Beneficiary commencing after the Administrator receives satisfactory proof of the Participant's death (or on the first regular distribution commencement date thereafter as the Employer or Administrator may establish from time-to-time),

unless prior to such date the Beneficiary elects a deferred commencement date, in a form and manner determined pursuant to sections 7.06, 7.07 and 7.08.

- (b) If there are two or more Beneficiaries, the provisions of this section and section 7.08 shall be applied to each Beneficiary separately with respect to each Beneficiary's share in the Participant's account.
- (c) If the Beneficiary dies after beginning to receive benefits but before the entire account balance has been distributed, the remaining account balance shall be paid to the estate of the Beneficiary in a lump sum.
- (d) Under no circumstances shall the Employer or the Plan be liable to the Beneficiary for the amount of any payment made in the name of the Participant before the Administrator receives satisfactory proof of the Participant's death.

7.06 Payment Options. A payee's election of a payment option must be made at least thirty (30) days prior to the date that the payment of benefits is to commence. If a timely election of a payment option is not made, benefits shall be paid in accordance with section 7.07. Subject to applicable law and the other provisions of this Plan, distributions may be made in accordance with one of the following payment options.

- (a) A single lump-sum payment;
- (b) Installment payments for a period of years (payable on a monthly, quarterly, semi-annual, or annual basis) which extends no longer than the life expectancy of the Participant or Beneficiary as permitted under Code § 401(a)(9);
- (c) Partial lump-sum payment of a designated amount, with the balance payable in installment payments for a period of years, as described in subsection (b);
- (d) Annuity payments (payable on a monthly, quarterly, or annual basis) for the lifetime of the Participant or for the lifetimes of the Participant and Beneficiary in compliance with Code § 401(a)(9); or
- (e) Such other forms of installment payments as may be approved by the Employer consistent with the requirements of Code § 401(a)(9).

7.07 Default Distribution Option. In the absence of an effective election by the Participant, Beneficiary or other payee, as applicable, as to the commencement and/or form of benefits, distributions shall be made in accordance with the applicable requirements of Code §§ 401(a)(9) and 457(d), and proposed or final Treasury Regulations thereunder.

7.08 Limitations on Distribution Options. Notwithstanding any other provision of this Article VII, Plan distributions shall satisfy the requirements of this section 7.08.

- (a) No distribution option may be selected by a payee under this Article VII unless it satisfies the applicable requirements of Code §§ 401(a)(9) and 457(d), and proposed or final Treasury Regulations thereunder.
- (b) For mandatory distributions, if any, made on or after the effective date of and subject to final Treasury Regulations under Code § 401(a)(31), payment of an account balance that exceeds \$1,000 but is less than \$5,000 (or other applicable limit under the Code) and for which the Participant has not made an election to receive in cash or to rollover to a qualified retirement plan shall, to the extent required by and in accordance with such regulations, be rolled over to an account set up for the benefit of the Participant with the IRA provider designated from time-to-time by the Employer or Administrator.
- (c) The terms of this Article shall be construed in accordance with all applicable Code sections.

#### 7.09 Transfers from the Plan.

If a Participant separates from service prior to his or her required beginning date, and becomes a Participant in an eligible deferred compensation plan of another governmental employer, and provided that payments under this Plan have not begun, such Participant may request a transfer of his or her account to the eligible deferred compensation plan of the other governmental employer.

Requests for transfers must be made to the Plan Administrator and shall be granted in the sole discretion of the Plan Administrator. If an amount is to be transferred pursuant to this provision, the Plan Administrator shall transfer such amount directly to the eligible deferred compensation plan of the other employer. Amounts transferred to another eligible deferred compensation plan shall be treated as distributed from this Plan and this Plan shall have no further responsibility to the Participant or any Beneficiary with respect to the amount transferred.

7.10 Taxation of Distributions. To the extent required by law, income and other taxes shall be withheld from each benefit payment and payments shall be reported to the appropriate governmental agency or agencies.

7.11 Eligible Rollover Distributions. (a) General. Notwithstanding any provision of the Plan to the contrary that would otherwise limit a distributee's election under this section, a distributee may elect, at the time and in the manner prescribed by the Employer, to have any portion of an eligible rollover distribution paid directly to an eligible retirement plan specified by the distributee in a direct rollover.

(b) Definitions. For purposes of this section, the following definitions shall apply.

- (1) Eligible Rollover Distribution. An eligible rollover distribution is any distribution of all or any portion of the balance to the credit of the distributee, except that an eligible rollover distribution does not include: any distribution

that is one of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the distributee or the joint lives (or joint life expectancies) of the distributee and the distributee's designated beneficiary, or for a specified period of ten years or more; any distribution to the extent such distribution is required under Code § 401(a)(9); any distribution that is a deemed distribution under the provisions of Code § 72(p); the portion of any distribution that is not includable in gross income; and any hardship distribution or distribution on account of unforeseeable emergency.

- (2) Eligible Retirement Plan. An eligible retirement plan is an individual retirement account described in Code § 408(a), an individual retirement annuity described in Code § 408(b), an annuity plan described in Code § 403(a) that accepts the distributee's eligible rollover distribution, a qualified trust described in Code § 401(a) (including § 401(k)) that accepts the distributee's eligible rollover distribution, a tax-sheltered annuity described in Code § 403(b) that accepts the distributee's eligible rollover distribution, or another eligible deferred compensation plan described in Code § 457(b) that accepts the distributee's eligible rollover distribution.
- (3) Distributee. A distributee includes an Employee or former Employee, the Employee's or former Employee's surviving spouse and the Employee's or former Employee's spouse or former spouse who is the alternate payee under a Qualified Domestic Relations Order, as defined in Code § 414(p), are distributees with regard to the interest of the spouse or former spouse.
- (4) Direct Rollover. A direct rollover is a payment by the Plan to the eligible retirement plan specified by the distributee.

7.12 Elections. Elections under this Article shall be made in such form and manner as the Plan Administrator may specify from time to time. To the extent permitted by and in accordance with the Code, any irrevocable elections as to the form or timing of distributions executed prior to January 1, 2002, are hereby revoked.

7.13 Practices and Procedures. The Employer may adopt practices and procedures applicable to existing and new distribution elections.

## **VIII. LEAVE OF ABSENCE**

8.01 Paid Leave of Absence. If a Participant is on an approved leave of absence from the Employer with Compensation, or on approved leave of absence without Compensation that does not constitute a Severance from Employment, which under the Employer's current practices is generally a

leave of absence without Compensation for a period of one year or less, said Participant's participation in the Plan may continue.

8.02 Unpaid Leave of Absence. If a Participant is on an approved leave of absence without Compensation and such leave of absence continues to such an extent that it becomes a Severance from Employment, said Participant shall have separated from service with the Employer for purposes of this Plan. Upon termination of leave without pay and return to active status, the Participant may enter into a new Participation Agreement to be effective when permitted by section 4.01.

## **IX. PARTICIPANT LOANS**

9.01 Authorization of Loans. If so specified in the Adoption Agreement, the Administrator may direct the Trustee to make loans to Participants on or after the effective date of Treasury Regulations or other guidance under Code § 457 and to the extent allowable under and in accordance with Code § 457. Such loans shall be made on the application of the Participant in a form approved by the Administrator and on such terms and conditions as are set forth in this Article, provided, however, that the Administrator may adopt regulations, rules or procedures specifying different loan terms and conditions if necessary or desirable to comply with or conform to such Treasury Regulations or other guidance and other applicable law.

9.02 Maximum Loan Amount. In no event shall any loan made to a Participant be in an amount which shall cause the outstanding aggregate balance of all loans made to such Participant under this Plan exceed the lesser of:

- (a) \$50,000, reduced by the excess (if any) of: (i) the highest outstanding balance of loans from the Plan to the Participant during the one-year period ending on the day before the date on which the loan is made; over (ii) the outstanding balance of loans from the Plan to the Participant or the Beneficiary on the date on which the loan is made; or
- (b) One-half of the Participant's Total Amount Deferred.

9.03 Repayment of Loan. Each loan shall mature and be payable, in full and with interest, within five (5) years from the date such loan is made, unless

- (a) The loan is used to acquire any dwelling unit that within a reasonable time (determined at the time the loan is made) will be used as the principal residence of the Participant; or
- (b) Loan repayments are, at the Employer's election, suspended as permitted by Code § 414(u)(4) (with respect to qualified military service).

9.04 Loan Terms and Conditions. In addition to such rules and regulations as the Administrator may adopt, which rules are hereby incorporated into this Plan by reference, all loans to Participants shall comply with the following terms and conditions:

- (a) Loans shall be available to all Participants on a reasonably equivalent basis.
- (b) Loans shall bear interest at a reasonable rate to be fixed by the Administrator based on interest rates currently being charged by commercial lenders for similar loans. The Administrator shall not discriminate among Participants in the matter of interest rates, but loans granted at different times may bear different interest rates based on prevailing rates at the time.
- (c) Each loan shall be made against collateral, including the assignment of no more than one-half of the present value of the Participant's Total Amount Deferred as security for the aggregate amount of all loans made to such Participant, supported by the Participant's collateral promissory note for the amount of the loan, including interest.
- (d) Loan repayments must be made by payroll deduction. In all events, payments of principal and interest must be made at least quarterly and such payments shall be sufficient to amortize the principal and interest payable pursuant to the loan on a substantially level basis.
- (e) A loan to a Participant or Beneficiary shall be considered a directed investment option for such Participant's account balance.
- (f) No distribution shall be made to any Participant, or to a Beneficiary of any such Participant, unless and until all unpaid loans, including accrued interest thereon, have been satisfied. If a Participant terminates employment with the Employer for any reason, the outstanding balance of all loans made to him shall become fully payable and, if not paid within thirty days, any unpaid balance shall be deducted from any benefit payable to the Participant or his Beneficiary. In the event of default in repayment of a loan or the bankruptcy of a Participant who has received a loan, the note will become immediately due and payable, foreclosure on the note and attachment of security will occur, the amount of the outstanding balance of the loan will be treated as a distribution to the Participant, and the defaulting Participant's Accumulated Deferrals shall be reduced by the amount of the outstanding balance of the loan (or so much thereof as may be treated as a distribution without violating Code requirements).
- (g) The loan program under the Plan shall be administered by the Administrator in a uniform and nondiscriminatory manner. The Administrator shall establish procedures for loans, including procedures for applying for loans, guidelines governing the basis on which loans shall be approved, procedures for determining the appropriate interest rate, the types of collateral which shall be accepted as security, any limitations on the types and amount of loans offered, loan fees and the events which shall constitute default and actions to be taken to collect loans in default.

## **X. AMENDMENT OR TERMINATION OF PLAN**

**10.01 Termination.** The Employer may at any time terminate this Plan; provided, however, that no termination shall affect the amount of benefits, which at the time of such termination shall have accrued for Participants or Beneficiaries. Such accrued benefit shall include any Compensation deferred before the time of the termination and income thereon accrued to the date of the termination. Such amount shall be calculated in accordance with section 6.02(b) and the terms and conditions of the affected investment option. Upon such termination, each Participant in the Plan shall be deemed to have revoked his agreement to defer future Compensation as provided in section 4.06 as of the date of such termination and section 4.01(b) shall no longer be in effect. Each Participant's full Compensation on a nondeferred basis shall be restored.

**10.02 Amendment.** The Employer may also amend the provisions of this Plan at any time; provided, however, that no amendment shall affect the amount of benefits which at the time of such amendment shall have accrued for Participants or Beneficiaries, to the extent of and Compensation deferred before the time of the amendment and income thereon accrued to the date of the amendment, calculated in accordance with section 6.03 and the terms and conditions of the investment options hereunder; and provided further, that no amendment shall affect the duties and responsibilities of the Trustee unless executed by the Trustee.

To the extent permitted by applicable law, the Employer delegates to the Administrator the authority to adopt rules, regulations or procedures from time to time as may be necessary or desirable to conform Plan provisions to, or to elaborate Plan provisions in light of, technical amendments to the Code, Treasury regulations or other guidance issued under the Code, and such rules, regulations or procedures are hereby ratified by the Employer as having the force and effect of Plan amendments.

**10.03 Copies of Amendments.** The Administrator shall provide a copy of any Plan amendment to any Trustee or custodian and to the issuers of any investment options selected pursuant to section 6.01.

## **XI. TAX TREATMENT OF AMOUNTS CONTRIBUTED**

It is intended that pursuant to Code § 457, the amount of Deferred Compensation shall not be considered current compensation for purposes of federal income taxation. This rule shall also apply to state income taxation unless applicable state laws provide otherwise. Such amounts shall, however, be included as compensation to the extent required under the Federal Insurance Contributions Act (FICA). Payments under this Plan shall supplement retirement and death benefits payable under the Employer's group insurance and retirement plans, if any.

## **XII. NON-ASSIGNABILITY**

**12.01 Non-Assignability.** It is agreed that neither the Participant, nor any Beneficiary, nor any other designee shall have any right to commute, sell, assign, transfer, or otherwise convey the right to

receive any payments hereunder, which payments and right thereto are expressly declared to be non-assignable and non-transferable; and in the event of attempt to assign or transfer, the Employer shall have no further liability hereunder, nor shall any unpaid amounts be subject to attachment, garnishment or execution, or be transferable by operation of law in event of bankruptcy, insolvency, except to the extent otherwise required by law.

12.02 Qualified Domestic Relations Orders. If so specified in the Adoption Agreement, domestic relations orders approved by the Plan Administrator shall be administered as follows.

- (a) To the extent required under a final judgment, decree, or order meeting the requirements of Code § 414(p), herein referred to as a Qualified Domestic Relations Order (“QDRO”), which is duly filed upon the Employer, any portion of a Participant’s account may be paid or set aside for payment to a spouse, former spouse, or a child of the Participant. Where necessary to carry out the terms of such a QDRO, a separate account shall be established with respect to the spouse, former spouse, or child, and such person shall be entitled to make investment selections with respect thereto in the same manner as the Participant. All costs and charges incurred in carrying out the investment selection shall be deducted from the account created for the spouse, former spouse, or child making the investment selection.

Any amounts so set aside for a spouse, former spouse or a child shall be paid out in a lump sum at the earliest date that benefits may be paid to the Participant, unless the QDRO directs a different form of payment or different payment date. Withholding and income tax reporting shall be done with respect to the alternate payee under the terms of the Code as amended from time to time.

- (b) The Employer’s liability to pay benefits to a Participant shall be reduced to the extent that amounts have been paid or set aside for payment to a spouse, former spouse or child pursuant to this section. No amount shall be paid or set aside unless the Employer, or its agents or assigns, has been provided with satisfactory evidence releasing them from any further claim by the Participant with respect to these amounts. The Participant shall be deemed to have released the Employer from any claim with respect to such amounts in any case in which the Employer has been notified of or otherwise joined in a proceeding relating to a QDRO which sets aside a portion of the Participant’s account for a spouse, former spouse or child, and the Participant fails to obtain an order of the court in the proceeding relieving the Employer from the obligation to comply with the QDRO.
- (c) The Employer shall not be obligated to comply with any judgment, decree or order which attempts to require the Plan to violate any Plan provision or any provision of Code § 457. Neither the Employer nor its agents or assigns shall be obligated to defend against or set aside any judgment, decree, or order described herein or any legal order relating to the division of a Participant’s benefits under the Plan unless the full expense of such legal action is borne by the Participant. In the event that the Participant’s action (or inaction) nonetheless causes the Employer, its agents or assigns



to incur such expense, the amount of the expense may be charged against the Participant's account and thereby reduce Employer's obligation to pay benefits to the Participant. In the course of any proceeding relating to divorce, separation, or child support, the Employer, its agents and assigns shall be authorized to disclose information relating to Participant's individual account to the Participant's spouse, former spouse or child (including the legal representatives of the spouse, former spouse or child), or to a court.

### **XIII. DISCLAIMER**

The Employer and the Administrator make no endorsement, guarantee or any other representation and shall not be liable to the Plan or to any Participant, Beneficiary, or any other person with respect to (a) the financial soundness, investment performance, fitness, or suitability (for meeting a Participant's objectives, future obligations under the Plan, or any other purpose) of any investment option offered pursuant to section 6.01 or any investment vehicle in which amounts deferred under the Plan are actually invested, or (b) the tax consequences of the Plan to any Participant, Beneficiary or any other person.

### **XIV. EMPLOYER PARTICIPATION**

Notwithstanding any other provisions of this Plan, the Employer may add to the amounts payable to any Participant under the Plan additional Deferred Compensation for services to be rendered by the Participant to the Employer during a payroll period, provided such additional Compensation deferred, when added to all other Compensation deferred under the Plan, does not exceed the maximum deferral permitted by Article IV.

### **XV. INTERPRETATION**

15.01 Governing Law. This Plan shall be construed under the laws of the state in which the Employer's headquarters is located.

15.02 § 457. This Plan is intended to be an eligible deferred compensation plan within the meaning of Code § 457, and shall be interpreted so as to be consistent with such section and all regulations promulgated thereunder.

15.03 Word Usage. Words used herein in the singular shall include the plural and the plural the singular where applicable, and one gender shall include the other genders where appropriate.

15.04 Headings. The headings of articles, sections or other subdivisions hereof are included solely for convenience of reference, and if there is any conflict between such headings and the text of the Plan, the text shall control.

15.05 Entire Agreement. This Plan, the executed Adoption Agreement and any properly adopted amendment thereof, shall constitute the total agreement or contract between the Employer and the Participant regarding the Plan. No oral statement regarding the Plan may be relied upon by the Participant. This Plan and any properly adopted amendment, shall be binding on the parties hereto and their respective heirs, administrators, Trustees, successors, and assigns and on all designated Beneficiaries of the Participant.

ADOPTION AGREEMENT

CITY OF TMPE

SECTION 457

ELIGIBLE DEFERRED COMPENSATION PLAN

FOR CITY OF TEMPE

**BENEFITSCORP, INC.**

**SECTION 457 ELIGIBLE DEFERRED COMPENSATION PLAN  
FOR GOVERNMENTAL EMPLOYERS**

The Employer named below hereby establishes (or, as applicable, amends and restates) a Deferred Compensation Plan for eligible Employees as provided in this Adoption Agreement and the accompanying BenefitsCorp Section 457 Eligible Deferred Compensation Plan document.

**A. EMPLOYER INFORMATION.**

**1. EMPLOYER'S NAME AND ADDRESS:**

City of Tempe  
20 E. 6<sup>th</sup> Street  
Tempe, AZ 85281

**2. TELEPHONE NUMBER:** 480-350-8278

**3. TAX ID NUMBER:** 86-60000262

**4. NAME OF PLAN:** The City of Tempe Deferred Compensation Plan

**5. NAME OF PLAN ADMINISTRATOR (the Employer unless another person(s) is appointed as set forth in section 3.02 of the Plan):**

City of Tempe Deferred Compensation Committee

**B. EFFECTIVE DATE.** (Check box 1 OR box 2 and fill in the blank(s).)

1. ☐ This is a new Plan having an effective date of \_\_\_\_\_.

2. ☒ This is an amended and restated Plan.

The effective date of the original Plan was 9/20/79.

The effective date of the amended and restated Plan is 7/1/02.

*(Check each box that applies.)*

Internal Revenue Code (“Code”) § 457(g) shall be satisfied by setting aside plan assets for the exclusive benefit of participants and beneficiaries, as follows:

1. ☒ in a trust pursuant to the provisions of Article V of the Plan. The Employer, or certain employees (or holders of certain positions with Employer) as named on page 6 of this Adoption Agreement shall be the Trustee.
2. ☐ in a trust pursuant to a separate written trust agreement entered into between the Employer and the bank or trust company named on page 5 of this Adoption Agreement.
3. ☐ in one or more annuity contracts meeting the requirements of Code § 401(f).
4. ☐ in a custodial account meeting the requirements of Code § 401(f), pursuant to a separate written agreement with the Custodian named on page 4 of this Adoption Agreement.

(Check each box that applies.)

**“Employee” shall mean:**

1. ☒ any full-time employee working 20 or more hours per week
2. ☐ any permanent part-time employee working fewer than \_\_\_\_ hours per week
3. ☐ any seasonal, temporary or similar part-time employee
4. ☒ any elected or appointed official
5. ☐ any independent contractor

who performs services for and receives any type of compensation from the Employer (or any agency, department, subdivision or instrumentality of the Employer) for whom services are rendered. If Box D.4 is not checked, elected or appointed officials will not be treated as Employees and will not be eligible to participate in the Plan, without regard to whether they are treated as common-law employees or independent contractors for other purposes. The following are the additional requirements or limitations, if any, for one or more of the specified class(es) of employees to be eligible to participate in the Plan:

\_\_\_\_\_ Eligible employees must have completed 30 days of employment with the City of Tempe

**E. FICA REPLACEMENT (“3121”) PLAN.**

Check the applicable box(es) if this Plan is a retirement system providing FICA replacement retirement benefits pursuant to regulations under Code § 3121(b)(7)(F) for ☐ full time employees and/or ☐ part-time employees, and complete the following. *(Check each box that applies.)*

1. ☐ The Employer shall make an annual contribution to each Participant’s account equal to \_\_\_\_\_ percent of such Participant’s Compensation.
2. ☐ Each Participant is required to make an annual contribution of \_\_\_\_\_ percent of Compensation.

*(Note: The total percentage of 1 and 2 must equal at least 7.5%.)*

In the event that this Plan is a retirement system providing FICA replacement retirement benefits as described above, all references to Unforeseeable Emergency distributions in the plan document shall be null and void.

**F. ROLLOVERS.** *(Check each box that applies.)*

1. ☒ Rollovers from eligible Code §§ 457(b) plans SHALL BE allowed.
2. ☐ Rollovers from plans qualified under Code §§ 401(a), 403(a) and 403(b) SHALL BE allowed.
3. ☐ Rollovers from Individual Retirement Accounts and Annuities described in Code §§ 408(a) and (b) SHALL BE allowed.

**G. PARTICIPANT LOANS.** *(Check Box 1 OR Box 2.)*

1. ☐ The Administrator MAY direct the Trustee to make Participant loans in accordance with Article 9 of the Plan.
2. ☒ The Administrator MAY NOT direct the Trustee to make Participant loans in accordance with Article 9 of the Plan.

**H. QUALIFIED DOMESTIC RELATIONS ORDERS.** *(Check Box 1 OR Box 2.)*

1. ☒ The Plan SHALL accept qualified domestic relations orders as provided in section 12.02 of the Plan.
2. ☐ The Plan SHALL NOT accept qualified domestic relations orders as provided in section 12.02 of the Plan.

This Plan and Adoption Agreement are duly executed on behalf of the Employer.

**EMPLOYER'S AUTHORIZED SIGNORS:**

By: \_\_\_\_\_ By: \_\_\_\_\_

Title: \_\_\_\_\_ Title: \_\_\_\_\_

Date: \_\_\_\_\_ Date: \_\_\_\_\_

**CUSTODIAN**

**[Complete this section only if box C.4. on page 2 was checked.]**

Employer has elected to meet the trust requirement of Code § 457(g) by setting plan assets aside for the exclusive benefit of participants and beneficiaries in a custodial account meeting the requirements of Code § 401(f). The bank or trust company custodian named below shall be the “deemed trustee” of plan assets held pursuant to the custodial agreement.

A. Effective \_\_\_\_\_, the following named bank or trust company is hereby appointed as custodian of all or a portion of the assets of the Employer’s § 457 Deferred Compensation Plan:

\_\_\_\_\_  
\_\_\_\_\_

B. INDIVIDUAL(S) AUTHORIZED TO ISSUE INSTRUCTIONS TO CUSTODIAN/TRUSTEE:

\_\_\_\_\_  
\_\_\_\_\_

This appointment is duly signed on behalf of the Employer and the Custodian.

EMPLOYER

\_\_\_\_\_  
[Signature]

\_\_\_\_\_  
[Title]

\_\_\_\_\_  
[Date]

CUSTODIAN

\_\_\_\_\_  
[Signature]

\_\_\_\_\_  
[Title]

\_\_\_\_\_  
[Date]



**TRUSTEE**

A. Effective May 1, 1998, the following is hereby appointed as trustee for and accepts the trust created by the Employer's § 457 Deferred Compensation Plan:

**1. Complete this section A. 1. only if box C. 1. on page 2 was checked.**

☐ The Employer or ☒ The following named employees:

Assistant City Manager

Human Resources Manager

Financial Services Manager

**2. Complete this section A. 2. only if box C. 2. on page 2 was checked.**

☐ The following named bank or trust company:

\_\_\_\_\_

B. NAME(S) OF EMPLOYEE(S) AUTHORIZED TO ISSUE INSTRUCTIONS TO TRUSTEE:

Employee Benefits Supervisor; Human Resources Manager; Deputy Human Resources Manager; Deputy Financial Services Manager

\_\_\_\_\_

This Trustee appointment is duly signed on behalf of the Employer and the Trustee.

EMPLOYER

TRUSTEE

\_\_\_\_\_  
[Signature]

\_\_\_\_\_  
[Signature]

\_\_\_\_\_  
[Title]

\_\_\_\_\_  
[Title]

\_\_\_\_\_  
[Date]

\_\_\_\_\_  
[Date]

TRUSTEE

TRUSTEE

\_\_\_\_\_  
[Signature]

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